sub-s (3) the land administrator is required to refer the matter to the High Court.

In *The Chartered Bank* v *Packiri Maideen & Anor*[1] Gill J (as he then was) said:

> It is to be observed that ss 149 to 154 of the Land Code contemplate the sale of land by public auction. It is of course open to the parties to sell the lands by private treaty before any proceedings are commenced in court, but once such proceedings are commenced the lands have to be sold by public auction.

The provisions of ss 149 to 154 of the Land Code (Cap 138) are similar to the provisions of ss 256 to 259 of the National Land Code (procedure in respect of lands held under Registry title) and the provisions of ss 141 to 148 of the Land Code are similar to the provisions of ss 260 to 265 of the National Land Code (procedure in respect of lands held under Land Office Title). I do agree that the sale contemplated in Chapter 3 Part Sixteen of the National Land Code (ss 256 to 259 and ss 260 to 265 are in this Chapter) is a sale by public auction. The court cannot order any sale by private treaty. It is my view that the court has no power to order sale by private treaty even under s 265(3)(c) of the National Land Code. '... to make such other order as it may think just' to my mind does not include the power to order sale by private treaty. Under this sub-s the court may, for example, direct the land administrator to put up the land for sale by public auction for the third time at a reduced reserve price. (See *Collector of Land Revenue Kota Bharu* v *Yusoff bin Yunus*.[2]) This will be consistent with the provisions of s 259(2)(c) wherein no power is reserved to the court 'to make such other order as it may think just.' It is my view that under this subsection when there is no bid at the second auction the court may order the land to be put up for auction for the third time. In fact there is no limit as to the number of times the land can be put up for auction and for each time the court may reduce the reserve price.

However, this does not mean that whenever there is an order for sale of land by public auction either by order of court under s 256 or by the land administrator under s 263 the land in question cannot in any circumstances be sold by private treaty. In my view the proposition in *Packiri Maideen's* case that '... but once proceedings are commenced the lands have to be sold by public auction' is no longer valid in view of the provisions of s 266(1) of the National Land Code which states as follows:

> 266 Right of chargor to tender payment at any time before sale.
>
> (1) Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in subsection (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.

There was no similar provision in the Land Code (Cap 138). In my view the court may allow a chargor of any land to sell the land in question by private treaty in circumstances where the court is satisfied that the proceeds of such sale are not less than the amount due to the chargee under the charge and that the chargee will be duly paid in full out of the said proceeds.

In this case the defendants' application is to sell the properties at the purchase price of $210,000 when the amount still due under the charge was $524,660.91 as at 14 April 1987.

I therefore dismissed the defendants' application. The plaintiffs' application had already been dismissed in chambers.

Application dismissed.

Solicitors: *Charles Rajah & Co; J Balan & Co; Anamalai & Co.*

Reported by *Yap Shao Sin*

Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v Dato James Ling Beng King

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO D1-22-187-88
GUNN CHIT TUAN J
3 MARCH 1989

Banking – Sale of shares in licensed bank – Prior approval of Minister of Finance needed – No specific performance of sale agreement as no approval was obtained – Banking Act 1973, s 23A

Contract – Sale of shares in licensed bank – Prior approval of Minister of Finance needed – Whether non-disclosure of request for approval fatal to application for interim injunction to restrain sale to other persons – Whether specific performance of sale agreement can be given when no approval was obtained – Object of sale agreement contrary to public policy – Banking Act 1973, s 23A – Contracts Act 1950, s 24(e)

In this case, the defendant applied for an order to set aside the interim injunction obtained against him by the plaintiff. The injunction restrained the defendant from entering into any agreement with any party other than the plaintiff in the sale of certain shares held by the defendant until final determination of the suit filed by the plaintiff. The defendant also applied for the plaintiff's writ of summons and statement of claim to be struck out pursuant to O 18 r 19(1) of the Rules of the High Court 1980.

The defendant contended that (a) there had been non-disclosure of material facts on the plaintiff's part in that when she applied for the interim injunction she never disclosed to the court a letter written by her former solicitors, M/s Skrine & Co,

to the Governor of Bank Negara seeking the approval of the Minister of Finance for the sale of the shares pursuant to s 23A of the Banking Act 1973; (b) there was non-compliance with s 23A of the Banking Act 1973 which required any agreement or arrangement for the sale of shares in a bank to have the prior approval of the Minister of Finance; (c) the plaintiff could not obtain specific performance of the agreement between her and the defendant because the object of the agreement was opposed to public policy under s 24(e) of the Contracts Act 1950 and thus unlawful.

Held, allowing the defendant's application:

(1) There was non-disclosure of material facts, especially the vital letter written by the plaintiff's former solicitors, M/s Skrine & Co, to the Governor of Bank Negara. The plaintiff in her application for the interim injunction through her present solicitors had also failed to draw the court's attention to s 23A of the Banking Act 1973 and to the fact that up to the present date there had been no approval of the Minister of Finance for the agreement pursuant to s 23A of the Banking Act.

(2) Section 23A of the Banking Act is clear and comprehensive in prohibiting a person from entering into an arrangement or agreement to acquire a shareholding which, when aggregated with existing shareholding, would amount to not less than five percentum of the issued shares of a licensed bank, without obtaining the prior approval of the Minister of Finance upon the recommendation of the Central Bank. It is also clear from that section that it covers arrangements or agreements, both formal and informal, express and implied.

(3) In this case, the plaintiff would not be liable to obtain specific performance of the said agreement in view of s 24(e) of the Contracts Act, as it is obviously a matter of public policy that the prior approval of the Minister of Finance under s 23A of the Banking Act must be obtained before any agreement or arrangement is entered into for the acquisition of an aggregate of five percent holding in any licensed bank.

Cases referred to

1 *Vethanayagam* v *Karuppiah & Ors* [1968] 1 MLJ 283 (refd)
2 *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng* [1978] 1 MLJ 40 (refd)
3 *Cayne & Anor* v *Global Natural Resources plc* [1984] 1 All ER 225 (refd)

Legislation referred to

Banking Act 1973 ss 23A, 24(1)
Contracts Act 1950 s 24(e)

Cecil Abraham and *Bharti R Seth (Ms)* for the defendant/applicant.

Liew Teck Keong for the plaintiff/respondent.

Cur Adv Vult

Gunn Chit Tuan J: This was an application by way of summons-in-chambers dated 1 November 1988, by YB Dato James Ling Beng King ('defendant') for an order that the injunction granted by me on 8 September 1988, restraining him from entering into any agreement with any party other than YAM Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar ('plaintiff') in respect of the sale of one million Kong Ming Bank Berhad shares including the 1.2 million shares acquired under the rights issue of the said shares held by the defendant until final determination of the suit filed by the plaintiff be set aside.

There was also an application that the plaintiff's writ of summons and the statement of claim both dated 7 September 1988, be struck out pursuant to O 18 r 19(1) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of this Honourable Court as the writ of summons and statement of claim disclose no reasonable cause of action, may prejudice, embarrass or delay the fair trial of the action or are otherwise an abuse of the process of this court.

The other orders applied for were that a date be fixed for assessment of damages, and that the plaintiff do pay to the defendant the costs of the application.

Mr Cecil Abraham, leading counsel for the defendant, at the commencement of his address pointed out that the plaintiff who applied for an interim injunction on 8 September 1988 never disclosed to the court a letter dated 13 June 1988 written by the plaintiff's former solicitors, M/s Skrine & Co, to the Governor of Bank Negara to seek the approval of the minister for the sale of the said shares pursuant to s 23A of the Banking Act 1973. Counsel then stated that the defendant's application was based on three grounds. The first ground, he submitted, was that in law the plaintiff could not obtain specific performance of the agreement between her and the defendant. Secondly, he referred to s 23A of the Banking Act 1973 which is as follows:

> 23A Acquisition of an aggregate of five per centum holding.
>
> (1) Without prejudice to s 23 and s 24 and subject to s 23B, no person shall enter into an arrangement or agreement formal or informal, expressed or implied, to acquire any interest in the shares of a licensed bank incorporated in the Federation by which he would, if the arrangement or agreement is carried out, obtain an aggregate interest in shares of not less than five per centum of the issued shares of that licensed bank without the prior approval of the Minister to his entering into such arrangement or agreement.
>
> (2) An application for approval under this section shall be sent to the Central Bank and thereupon the Central Bank shall submit such application with its recommendation to the Minister.
>
> (3) The provision of this section shall apply mutatis mutandis to any subsequent arrangements or agreements to acquire any interest in shares of such licensed bank incorporated in the Federation additional to those in respect of which an approval by the Minister was given under this section.

and submitted that under sub-s (1) of the said section, any agreement or arrangement for the sale of shares in a bank must have the prior approval of the Minister of Finance. He pointed out that in this case there was also violation of s 24(e) of the Contracts Acts 1950, which is as follows:

24 The consideration or object of an agreement is lawful, unless
(a) ...
(b) ...
(c) ...
(d) ...
(e) the court regards it as immoral, or opposed to public policy.

His third ground was that there has been non-disclosure of material facts.

As regards non-compliance of s 23A of the Banking Act 1973 and the contention that the object of the agreement was not lawful because it is opposed to public policy under s 24(e) of the Contracts Act 1950, counsel referred to the affidavit of the plaintiff affirmed on 7 September 1988 wherein it was averred, inter alia, that sometime between 1 April 1988 and 26 April 1988, negotiations were conducted between her and the defendant for the sale of 1,000,000 shares in Kong Ming Bank Berhad held by the defendant. A consideration of $9m was agreed upon for the said shares. During the course of the negotiations the defendant expressed his stipulation that $2m was to be paid to him on acceptance of the offer of sale. On or about 26 April 1988 the defendant by a letter of the same date formally offered to sell to the plaintiff all his rights titles in the said shares and undertook to execute any sale and purchase agreement in reasonable terms to be drafted by her solicitors, M/s Skrine & Co. On 16 May 1988 the plaintiff communicated her acceptance of the share offer and advanced $2m to the defendant of which $500,000 was in cash and $1.5m in a Hongkong & Shanghai Bank cheque No 263097 as deposit for the sale. Mr Abraham stated that it was the contention of the plaintiff that on 16 May 1988 there was a contract. The defendant agreed that there was on 16 May 1988 an agreement when the plaintiff accepted the defendant's offer on that date for which she also advanced $2m to the defendant as deposit for the sale. Counsel then pointed out that on that day there was still no approval of the Minister of Finance for the sale of the said shares under s 23A of the Banking Act 1973.

He then referred to the following letter (exh YLBK-2 to encl 8) which the plaintiff's former solicitors wrote to the Governor of Bank Negara on 13 June 1988:

PM/jk/112784.7
13 June 1988
The Governor
Bank Negara
Jalan Kuching
Kuala Lumpur

YB Tan Sri,

Re: Purchase of Kong Ming Bank Shares

We act on behalf of YAM Tunku Kamariah Mahmood Iskandar.

Our client is desirous of acquiring one million shares in Kong Ming Bank Berhad from Dato James Ling.

Pursuant to Section 23A of the Banking Act 1973, our client would be grateful for the approval of the Minister to entering into negotiations with Dato James Ling on this proposal.

If the Minister sees fit to grant his approval the details of the arrangement will, of course, be submitted for the Minister's approval before any formal agreement is entered into.

Yours faithfully,

cc client,

and pointed out that the agreement in question between the parties was already entered into on 16 May 1988 but the above letter was only written to Bank Negara on 13 June 1988 and it was also not disclosed to the court when the plaintiff applied for the interim injunction.

Counsel also submitted that the object of the said agreement was not lawful because of s 24(e) of the Contracts Act 1950, and on the question of illegality he referred to the following passage in the judgment of Raja Azlan Shah J (as he then was) in *Vethanayagam* v *Karuppiah & Ors*:[1]

> Jurisdiction to grant a temporary injunction is always a matter of discretion which is to be exercised in accordance with well-known principles. An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad* v *Sashi Bhusan*). In other words, a temporary injunction will not be granted in cases where a permanent injunction is not available under ss 52 to 54 of the Specific Relief (Malay States) Ordinance 1950. Section 54(f) enacts that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. This means that a court will not grant an injunction to prevent the breach of a contract if the contract be such as cannot be specifically enforced under the provisions of Chapter II of the Ordinance, for example s 20(b). The grant of injunction therefore is always guided by the same principles as the grant of specific performance of a contract, and if the contract is such as not to be capable of being specifically enforced, no injunction can be granted to prevent its breach.

Mr Abraham then stated that a contract which was illegal because it involves the commission of a crime or tort or which is immoral or contrary to public policy, is void (see *Gareth Jones on Specific Performance* at p 83). He then pointed out that s 23A of the Banking Act was also not brought to the attention of the court when the plaintiff applied for the interim injunction and referred to the following passage of the judgment of Hashim Yeop A Sani J (as he then was) in *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng*:[2]

> The sole ground on which the Notice of Motion is based is of course as set out in paragraph (a) of the defendant's affidavit, that is to say, that the plaintiff had not stated the facts fully and accurately and that the plaintiff had not disclosed

all material facts. It is an established law that the court in an application of this nature must be satisfied that the person who asked for the interlocutory injunction did not mean to deceive the court and that the court is bound to maintain the principle that those who come 'asking ex parte for injunctions must proceed with the highest good faith, and keep back no material facts': see *Schmitten* v *Faules* [1893] WN 64. This standard has been maintained strictly and it was even held that when a party comes for an injunction there is no obligation upon him to ascertain what are the important facts of the case and it is no excuse to say that the party does not consider the facts to be important. The party applying for ex parte injunction is bound to state not only the facts that he considers material but all facts within his knowledge that are material and therefore if it is shown that a plaintiff had innocently omitted to state circumstances which turn out to have material bearing upon his rights the injunction should be dissolved: see *Daglish* v *Jarvie*.

Counsel ended his submission by stating that as the plaintiff had failed to disclose material facts to the court, the interim injunction should be dissolved.

Mr Liew, counsel for the plaintiff, also referred to the above quoted letter to the Governor of Bank Negara and stated that at the time of application for the interim injunction, the plaintiff was not in possession of that letter. He then stated that even if the plaintiff's former solicitors, M/s Skrine & Co had written to the Governor of Bank Negara, Bank Negara would not be able to entertain the application in the absence of any formal agreement being submitted to it for consideration. Mr Liew also referred to the above quoted s 23A of the Banking Act as well as to the following s 24(1) of the said Act:

> 24(1) Every licensed bank shall obtain the approval of the Minister of any proposed
>
> (a) arrangement or agreement
>
> (i) for the sale or disposal of its shares or business; or
>
> (ii) affecting voting power, management or other matters,
>
> which will result in a change in the control or management of the bank;

and agreed that there was an agreement on 16 September 1988 but stated that it had not yet been translated into a formal agreement. He contended that without a formal agreement the plaintiff could not apply to Bank Negara for the minister's consent. He also stated that there were serious questions to be tried and that the status quo should be maintained and that there must be an interim injunction pending disposal of this suit.

In his reply, Mr Abraham pointed out that the above quoted letter of 13 June 1988 to the Governor of Bank Negara was copied to the plaintiff by M/s Skrine & Co. He contended that it was therefore the duty of the plaintiff as a client to brief her new solicitors fully before applying for the interim injunction. On the question of whether there was an issue to be tried, counsel referred to *Cayne & Anor* v *Global Natural Resources plc*[3] in which the UK Court of Appeal has held, inter alia, that for the purposes of an application for an interlocutory injunction there is a triable issue between the parties if there is a serious question to be tried (ie one for which there is some supporting material) of which the outcome is uncertain. It was his contention that in this case there was no triable issue between the parties as there is no serious question to be tried and it was clear that the plaintiff would not be able to obtain specific performance of the agreement in question.

Having heard and considered this case I was satisfied that there was non-disclosure of material facts, especially the vital above-quoted letter written by the plaintiff's former solicitors, M/s Skrine & Co, to the Governor of Bank Negara. The plaintiff in her application for the interim injunction through her present solicitors had also failed to draw the court's attention to s 23A of the Banking Act 1973, and to the fact that up to the present date there has been no approval of the Minister of Finance for the said agreement pursuant to s 23A of the Banking Act.

With respect to counsel for the plaintiff, I considered that s 23A of the Banking Act is clear and comprehensive in prohibiting a person from entering into any arrangement or agreement to acquire a shareholding which when aggregated with existing shareholding would amount to not less than five percentum of the issued shares of a licensed bank without obtaining the *prior* approval of the Minister of Finance, upon the recommendation of the Central Bank. It is also clear from that section that it covers arrangements or agreements, both formal and *informal*, express or implied. In this case the plaintiff would not be able to obtain specific performance of the said agreement in view of s 24(e) of the Contracts Act, as it is obviously a matter of public policy that the prior approval of the Minister of Finance under s 23A of the Banking Act must be obtained before any agreement or arrangement is entered into for the acquisition of an aggregate of five percentum holding in any licensed bank. In all the circumstances of the case and for the reasons stated, I therefore exercised my discretion in setting aside the interim injunction granted by me on 8 September 1988, and I also ordered that the plaintiff's writ of summons and statement of claim be struck off pursuant to O 18 r 19 of the Rules of the High Court 1980. I also ordered, as prayed for, that a date be fixed for assessment of damages, and that the plaintiff do pay to the defendant costs of the said application.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *Liew & Co*.

Reported by *Ng Sheau Jiuan*